think the sentence of 5 months imprisonment is excessive. I therefore partially allow the appeal against sentence and in case of doubt I also exercise my power of revision under s. 325 of the Criminal Procedure Code by reducing the sentence of imprisonment to 3 months from today since the appellant has been on bail pending the hearing of this appeal.

The appeal against conviction is dismissed but the sentence passed is varied accordingly.

THE HONGKONG AND SHANGHAI BANKING CORPORATION

v.

SYARIKAT UNITED LEONG ENTERPRISE SDN. BHD. & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[SUIT NO. T. 275 OF 1987]
15 MAY 1993

CONTRACT: Guarantee - Consideration - Guarantee signed after loan given - Whether past consideration - Whether good consideration for a guarantee; forbearance to sue - Whether constituted further consideration - Whether forbearance established; undue influence - Whether proved - Burden of proof s. 16(2) & (3) Contracts Act 1950 - Whether applicable; failure to appoint receiver - Whether 2nd defendant discharged from guarantee - Section 92 Contracts Act - 2nd defendant agreeing to certain terms - Effect; limit of liability - Whether left blank at time of execution of guarantee - Blank guarantee - Whether guarantee valid.

The 1st defendant, of which the 2nd defendant and his wife were directors, was a customer of the plaintiffs. Loans were given by the plaintiffs to the 1st defendant and were secured by charges and debenture. The 1st defendant was unable to repay the loans as far back as 1983. However, no receiver was appointed, though demanded by the 1st defendant. In June 1985, the plaintiffs demanded payment from the 1st defendant. A guarantee dated 3 October 1986 ('the guarantee') was signed by the 2nd defendant. No money was advanced after the execution of the guarantee.

The plaintiffs sued the defendants for money lent to the 1st defendant and guaranteed by the 2nd defendant.

Judgment upon an O. 14 application was entered against the 1st defendant and its counterclaim dismissed. But the 2nd defendant was granted leave to defend, the Judge concluding that two triable issues, of whether a demand had been made and whether the guarantee was void for lack of consideration, had been raised, and holding three other issues advanced by the 2nd defendant, including those of undue influence and negligence, not triable issues.

Held:

A. Effect of dismissal of O. 14 application.

The 2nd defendant was not shut out from pursuing the issues of undue influence and negligence. What the Judge had ordered was that the application of the plaintiffs for summary judgment be dismissed and not that any part of the defence of the 2nd defendant be struck out. Though the Judge had held some issues not triable issues, the whole of the defence of the 2nd defendant remained and the issues raised by the defence remained triable except for those which the 2nd defendant had chosen to abandon.

B. Consideration

[1] The defence of unenforceable past consideration or no consideration must fail.

The authorities and ss. 2(d) and 80 of the Contracts Act, 1950, lay down that past consideration can be good consideration for a guarantee even if the benefit was given before the execution of the guarantee, provided that, in a one-off transaction, like the present case, the benefit that was given to the principal debtor was given at the desire of the guarantor.

Though in the present case the Court was not addressed on the question of whether the loan was given to the 1st defendant 'at the desire' of the 2nd defendant, if it had been an issue, the Court would have had no difficulty in coming to the conclusion, since the 2nd defendant and his wife were the only directors of the 1st defendant, and in the other circumstances of the case, that the loan had been made 'at the desire' of the 2nd defendant.

[2] Though forbearance to sue can constitute further consideration, the plaintiff had failed to prove the existence of any such consideration. For a claim based on forbearance to succeed, it must be proved, by direct evidence or by inference from the circumstances of the case, that the guarantor had requested forbearance and that forbearance was granted. There was a total failure to prove that the 2nd defendant at any time requested forbearance.

C. Undue influence

The defence of undue influence must be dismissed. The 2nd defendant had failed to prove undue influence.

Where a person is deemed, under s. 16(2) of the Contracts Act 1950, to be in a position to the will of another, s. 16(3) provides for the dominating person to prove that the contract was not induced by undue influence. But in the present case, given the character of the 2nd defendant, and considering the fact that he appeared to be a man of letters, and the other circumstances of the case, the burden was on the 2nd defendant to prove undue influence. Furthermore, the fact that the 2nd defendant did not have independent legal advice did not mean that there was undue influence exerted on him to sign the gurantee.

D. Effect of failure to appoint receiver

The defence that the failure to appoint a receiver on the part of the plaintiffs discharged the 2nd defendant under s. 92 Contracts Act had no merit. As the 2nd defendant had agreed to the terms stated in the guarantee, he could not later complain about the very thing which he had agreed to. A surety is not discharged if by a clause in the guarantee, he had agreed to the creditor dealing with the security in the manner complained of.

E. Terms of the guarantee

Though the guarantee was most probably signed in blank, that is, the limit of liability and the interest rate had not been inserted in the gurantee at the time the 2nd defendant executed it, nevertheless, in the absence of fraud and misrepresentation, it was still valid.

[Judgment to be entered for plaintiff. Cost to be taxed and paid by the 2nd defendant].

Cases referred to:

Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors. [1991] 3 CLJ 1849 ***(not foll)***

Perwira Habib Bank Malaysia Bhd. v. Fast Travel (M) Sdn. Bhd. & Ors. [1988] 3 MLJ 210 ***(not foll)***

The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. & Anor. [1988] 2 CLJ 859 ***(not foll)***

Heng Cheng Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267 ***(refd)***

Guthrie Waugh Bhd. v. Malaippan Muthucumaru [1972] 1 MLJ 37 ***(foll)***

Pacific & Orient Insurance Co. Sdn. Bhd. v. Gimstern Corporation (M) Sdn. Bhd. & 5 Ors. [1989] 2 CLJ 721 ***(not foll)***

Kalicharan v. Abdul Rahman & Ors. AIR [1918] PC 226 ***(refd)***

M. Gulam Hussein Khan v. M. Fayas Ali Khan AIR [1949] OUDH 346 ***(refd)***

Frith v. Frith [1906] AC 254 ***(foll)***
Osman Bin Abdul Ghani & Anor. v. United Asian Bank Bhd. [1987] 1 CLJ 139 ***(refd)***
Saw Gaik Beow v. Cheong Yew Weng & Ors. [1989] 3 MLJ 301 ***(foll)***
Maria Chia Sook Lan v. Bank of China [1976] 1 MLJ 245 ***(refd)***
Bank Bumiputra Malaysia Bhd. v. Kredin Sdn. Bhd. & Anor. [1989] 1 MLJ 323 / [1988] 2 CLJ 750 ***(foll)***
Malaysian French Bank Bhd. v. Abdullah bin Mohd. Yusof & Ors. [1991] 2 MLJ 475 ***(refd)***
Gopal a/l Krishnan v. Syed Azman bin Syed Mohd. & Anor. [1991] 3 CLJ 1778 ***(refd)***
UMW Industries [1985] Sdn. Bhd. v. Kamaruddin bin Abdullah & Anor. [1989] 2 CLJ 1278 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2(d), 16(2), (3), 80, 92
Evidence Act 1950, s. 92

Other sources referred to:
Low Kee Yang on The Law of Guarantee in Singapore and Malaysia, p. 65

For the plaintiffs - Cecilia Pang; M/s. Peter Lo & Co.
For the 2nd defendant - P.K. Lim; M/s. P.K. Lim & Co.

JUDGMENT

Ian H.C. Chin JC:
By a writ issued on 7 August 1987 the plaintiffs sue United Leong Enterprise Sdn. Bhd. ("1st Defendant") and Leong Hon Kim @ Andrew ("2nd Defendant"). The claim against the second defendant is for RM310,875.26 being the money lent to the 1st defendant and guaranteed by the 2nd defendant. Judgment was upon an O. 14 application entered against the 1st defendant and its counterclaim was dismissed. The trial herein only concerns the plaintiffs' claim against the 2nd defendant. In order to understand better the issues I will first set out the relevant parts of the statement of claim, then the defence and thereafter the reply. The issues will then be summarised

B. Statement of Claim.

The relevant part of the claim against the 2nd defendant is paragraph 5 which reads:

> By a written Guarantee dated 3 October 1986 the 2nd defendant agreed for the consideration therein set out to guarantee the payment on demand of all advances made by the plaintiffs to the first defendant including all interest commission and banking charges thereon.

C. Defence

The relevant part of the defence, after taking into account the indication of Counsel for the 2nd defendant of the abandonment of certain of them, reads:

1. ...
2. The 2nd defendant denies that he is indebted to the plaintiffs as claimed in paragraph 3 of the plaintiffs' Statement of Claim or any at all for reasons stated in the following paragraphs.
3. the ... guarantee mentioned in paragraph 5 of the plaintiffs' Statement of Claim discloses a past consideration on the face of it.
4. There was no consideration moving from the plaintiffs to support the alleged guarantee. Alternatively, the consideration for the alleged guarantee was a past consideration.
5. In the premises, the alleged guarantee was not and is not binding on the 2nd defendant.
6. Further or in the alternative, the 2nd defendant admits that he entered into the alleged guarantee but he was induced to do so by the undue influence of the plaintiffs.

Particulars of Undue Influence

In October 1986, the plaintiffs through their solicitors insisted that unless the 2nd defendant, as a director for the 1st defendants signed a Letter of Guarantee to guarantee the repayment of the banking facilities they would foreclose the securities to secure the banking facilities. Faced with the threat, the 2nd defendant had no choice but to execute the Letter of Guarantee to guarantee the repayment of the sum of RM288,000 even though at that time the outstanding amount allegedly owed by the 1st defendants was lesser.

7. Further or in the alternative, the plaintiffs' loss was self imposed. The banking facilities were secured by a Debenture dated 7 July 1982, between the plaintiffs and the 1st defendants. It was the terms of the Debenture that, *inter alia*, the principal sum and interest shall immediately become payable:

   (a) if the 1st defendants shall make default in the payment of interests or other sum covenanted to be paid whether formally demanded or not;
   (b) if the 1st defendants cease or threaten to cease to carry on its business;

(c) in the event of the above happening to appoint a Receiver to take possession of, collect and get in all or any or the 1st defendants' property so secured and to sell such property and apply the proceeds of sale

(i) towards payment to the plaintiffs; and

(ii) any surplus to the 1st defendants.

8. In or about November 1983, the plaintiffs through its Manager became aware that due to financial problem faced by the 1st defendants, occasioned by a default of a third party, the 1st defendants threatened to cease and did cease its business.

9. Despite knowledge of the threat and cessation of business the plaintiffs negligently failed to discharge its duties under the Debenture, by appointing a Receiver to take possession of and sell the 1st defendants' assets so secured which at all material times comprised plant and machinery for making green veneer costing US$200,000 and a large quantity of green veneer ready for export costing at the material time US$586,432.60 respectively.

Particulars of Negligence

In or about November 1983, the 1st defendants through its director, Dr. Leong Hon Kim informed the plaintiffs' Manager that 1st defendants could not overcome its financial problem and had to give up its business venture. Under the terms of the Debenture, the plaintiffs had a duty to appoint a Receiver to take possession of and sell the 1st defendants' assets which at the material time comprised of plant and machinery for manufacturing green veneer costing US$200,000 and 4,511.02 cubic meter of processed and ready for export Malaysian Green Veneer costing at US$586,423 calculated at USS130 cubic meter. The Green Veneer became rotten and has since perished. The machinery and plant became unserviceable.

10. Had the plaintiffs taken action under the Debenture, the proceeds of sale of the plant and machinery and green veneer would be sufficient to extinguish what ever the outstanding banking facilities of the 1st defendants.

11. ...

12. ...

13. Save as hereinbefore expressly admitted, the [2nd] defendants deny each and every allegation in the Statement of Claim as though the same were herein specifically set forth and traversed *seriatim*.

14. ...

D. Reply.

The plaintiffs reply to the defence of the second defendant is in the following words, reproducing only the relevant part:

1. ...
2. ...
3. ...
4. The plaintiffs do not admit paragraph 6 of the Defence. The plaintiffs say that the guarantee was given by the 1st defendants willingly of which he was a director and shareholder. The plaintiffs did threaten to issue legal proceedings against the 1st defendants by way of notices of demand through their solicitors, Messrs. Chong & Pang, but they deny that they used any undue influence as alleged or any at all. On 23 August 1986, the 2nd defendant called at the plaintiffs' Bank and requested forbearance from the Bank for legal action to be taken against the 1st defendants. The plaintiffs did accede to such request and confirmed on the same day in writing to postpone any action against the 1st defendant for a period not exceeding three months provided a guarantee should be executed by the director. On 3 October 1987 the guarantee was executed by the 2nd defendant. The guarantee was given for the benefit of the 1st defendants, of which the 2nd defendant is a director and shareholder, time arranged for payment of the debt. Since then no action was taken by the plaintiffs against the 1st defendants for more than three months. In the aforesaid premises, there was and still is a valid consideration for the guarantee.
5. ...
6. ...
7. ...
8. ...
9. ...
10. ...
11. ...

The pleading of forbearance appears to be a departure from the statement of claim but no objection was at anytime taken to the pleading and the Court will take it that forbearance has been pleaded as forming part of the consideration for the guarantee.

E. Issues.

There was some initial confusion as to what are the issues that have to be tried. Counsel for the plaintiffs at first maintained that only two issues are triable and they are:

(1) whether a demand for payment was made, and
(2) whether the guarantee was void for lack of consideration.

This proposition is based on the fact that Dato' Hj. Mohamad Noor Hj. Ahmad, J. had in his grounds of decision (dated the 23 August 1990), when granting leave to the 2nd defendant to defend, after dismissing the application of the plaintiffs for summary judgment, concluded that the two aforesaid triable issues have been raised by the 2nd defendant; there were, according to the said learned Judge, three other issues advanced and these were:

(1) whether undue influence was exerted,
(2) whether there was negligence on the part of the plaintiffs in not appointing a receiver under a debenture and
(3) whether there was trespass when the plaintiffs failed to return certain land titles to the 2nd defendant - all of which he found not to be triable issues.

The issue of trespass was during the trial abandoned by Counsel for the 2nd defendant. The question then is the 2nd defendant shut out from pursuing the said issues of undue influence and negligence? I am of the opinion that the 2nd defendant is not. What the learned Judge had ordered was that the application of the plaintiffs for summary judgment be dismissed and he did not order any part of the defence of the 2nd defendant be struck out. Therefore the whole of the defence of the 2nd defendant remains and the issues raised by the defence remain triable except for those which the 2nd defendant had chosen to abandon. Therefore, the issues in this case are:

(1) was there consideration for the guarantee dated 3 October 1986;
(2) was undue influence exerted to procure the guarantee;
(3) does the failure of the plaintiffs to appoint a receiver for the 1st defendant discharge the 2nd defendant from his liability under the guarantee; and
(4) whether the 2nd defendant had agreed to the terms stated in the guarantee Exhibit P4.

II. Evidence of Case.

The 1st defendant, of which the 2nd defendant and his wife were directors, was a customer of the plaintiffs. Loans, one an overdraft (under account no. 396-017055-001) and the other a term loan (under account no. 396-017055-034), were given by the plaintiffs to the 1st defendant for which under the overdraft the 1st defendant owed the plaintiffs the sum of RM61,430.21 as at 4 August 1986 whereas the amount outstanding under the term loan was as at 26 August 1986, RM224,748.30. These loans were secured by charges and debenture. The 1st defendant was unable to repay the loans as far back as 1983. The 1st defendant had demanded that the plaintiffs appoint a receiver under the debenture and to sell certain veneer but the plaintiffs did not do so. In June 1985 the plaintiffs had demanded payment from the 1st defendant (see Exhibit D1). Those are the undisputed facts. No evidence was led by either sides as to what happened in between June 1985 and July 1986. What follows was a letter dated 22 August 1986 (Exhibit P6) which was allegedly issued by the plaintiffs and signed by a D R D Hutcheson. The area of disputes commenced from there. Exhibit P6 reads

> 22 August 1986
>
> The Managing Director
> Syarikat United Leong Enterprise Sdn. Bhd.
> P.O. Box 57
> 91007 Tawau
>
> Attn.: Dr. Leong Hon Kim
>
> Dear Sir
>
> We refer to our discussion of this afternoon regarding the letter of demand issued by our Lawyers. We confirm that we will be agreeable to postponing any action for a period of a few months but in any event not exceeding three months provided we are given realistic proposals for the reduction or liquidation of outstandings and the guarantee of the directors.
>
> In this connection, we enclose herewith a blank guarantee form which should be completed in front of our lawyers, Messrs.

Chong & Pang and returned to us in due course.

Yours faithfully

(Signed)
D R D Hutcheson

Manager
Enc
ry

cc Messrs. Chong & Pang
Tawau

This letter (Exhibit P6) was admitted without objection from the 2nd defendant but the 2nd defendant in his evidence said that though he did receive Exhibit P6 he denied meeting a D R D Hutcheson, that he did not know the person and that he never asked for action not to be taken. He also said he cannot recall receiving the blank guarantees that was sent with Exhibit P6. The plaintiffs called one of its officer PW2. In examination-in-chief, she said Exhibit P6 was sent together with a blank guarantee and that a guarantee, Exhibit P4, was thereafter returned to the plaintiffs by the law firm of Chong & Pang. Under cross-examination she said she cannot remember who despatched Exhibit P6 and she cannot remember seeing the blank guarantee form being despatched with Exhibit P6.

The events take us to the guarantee, Exhibit P4, which is dated the 3 October 1986 ("the guarantee"), upon which the plaintiffs based its claim against the 2nd defendant. With regards thereto, PW1, an advocate of the firm of Chong & Pang, testimony is as follows:

> The guarantee was signed in my presence in Royal Hotel coffee house ...
>
> ... Exhibit P4 signed in my presence. I did explain to the 2nd defendant the purpose of the guarantee. I explained the purpose of signing the guarantee to the 2nd defendant. I relayed the instructions of Hongkong & Shanghai Banking Corporation to the 2nd defendant. At the time of signing of the Exhibit P4 by the 2nd defendant, Exhibit P4 was already completed. I explained to the 2nd defendant that Exhibit P4 was for forbearance on the part of the bank to take legal action against the defendant for money owed to the bank. After I have explained the 2nd defendant signed Exhibit P4 ...

That was all that was said with regards to the guarantee when PW1 gave evidence in chief. Under cross-examination, he denied the guarantee was without the relevant particulars before the 2nd defendant executed the same and he denied having ever called the 2nd defendant or his wife regarding the execution of the guarantee. In re-examination he said:

> The figures for the Exhibits P4 ... were inserted by my firm. I cannot remember how Exhibits P4. ... came to my firm's possession before they were signed ...

The 2nd defendant in his evidence said he received Exhibit P6 but he did not meet a Hutcheson, the alleged signatory of Exhibit P6. He denied having asked the plaintiffs not to take action against the 1st defendant or against him. As for the Royal Hotel coffee house meeting with PW1, he said it was PW1 who called him over the phone and asked him to go to PW1's office but that he instead asked PW1 to join him at the said coffee house where he was going. When he reached the said coffee house, PW1 was already there. After ordering their drinks, PW1 took out two blank guarantees and requested him to sign while promising that he (PW1) would assist him to talk to the bank not to take legal action against his company and the securities. PW1 also, according to him, said signing the guarantee was for his own good and benefit and that if he signed his wife would not be asked to sign. He finally relented and signed the guarantees, one of which is Exhibit P4 but he said that when he signed the guarantee, the various places for insertions of the amount of the guarantee, the rate of interest and the date were all left blank or unfilled. The relevant clauses of the guarantee, for ease of reference, are reproduced here:

> 1. In consideration of your making or continuing advances or otherwise giving credit or affording banking facilities (including *inter alia* the issue of guarantees by you and your acceptance of guarantees by the Principal as hereinafter defined in favour of third parties) for as long as you shall think fit to Syk. United Leong Enterprise Sdn. Bhd. (hereinafter called "the Principal") we, the undersigned, hereby agree to pay to you on demand all sums of money which are now or shall at any time be owing to you anywhere on any account whatsoever whether from the Principal solely... Provided always that the joint and several

liability ultimately enforceable against us shall not exceed the principal sum of RM288,000 ... together with interest ...

2. ...
3. ...
4. ...
5. ...
6. You shall be at liberty without thereby affecting your rights against us hereunder and without notice to us and without our assent or knowledge at any time to determine enlarge or vary any credit to the principal to vary, exchange, abstain from perfecting or release any other securities held or to be held by you for or on account of the money intended to be hereby secured or any part thereof to renew bills and promissory notes in any manner and to compound, give time for payment, to accept compositions from and make any other arrangements with the principal or any obligants on bills, notes or other securities held or to be held by you for and on behalf of the principal and no act or omission on your part which, but for this provision, might operate so as to exonerate us or any of us or any other person or which would not have discharged or affected our liability, had we been principal debtor instead of guarantor, shall in any way exonerate us or any such person or discharge or diminish the validity of this guarantee or our liability hereunder.
7. The guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by you for all or any part of the money hereby guaranteed nor shall such collateral or other security or any lien to which you may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the monies hereby secured be in any way wise prejudiced or affected by this guarantee. And you shall have full power at your discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this guarantee or any liability hereunder. And all money received by you from us or the Principal or any other person or persons liable to pay the same may be applied to you to any account or items of account or to any transaction to which the same may be applicable.
8. ...
9. ...
10. ...
11. Our liability shall not be affected by the absence of or by any defective, excessive or irregular exercise of the borrowing powers of the Principal (if a company or companies) or by the Principal being an infant or being under any other disability or by an association or other unincorporated body not having a legal existence being named as principal or by any other fact or circumstance (whether known or not known to you and to any one or more of us) as a result of which any indebtedness or liability incurred or purported to be incurred by the principal or by any other person purporting to act on behalf of the principal is void or unenforceable by you against the principal and we agree that in any case we shall be liable to you as principal debtor(s) and by way of an indemnity for the same amount as that for which we would have been liable by way of guarantee had a valid and enforceable indebtedness or liability as between the Principal and you been created.
12. This guarantee shall be in addition to and not in substitution for any other guarantee for the Principal given by all or any of us to you.
13. ...
14. ...
15. ...
16. ...

There was no further advance of moneys by the plaintiffs to the 1st defendant after the 2nd defendant had executed the guarantee.

III. The Contentions, Finding of Facts & Conclusions.

A. Consideration

The second defendant contends that since no further money whatsoever was advanced by the plaintiffs to the 1st defendant at the date or after the signing of the guarantee, the guarantee was actually to secure past advances and therefore was for a past consideration and unenforceable. Counsel for the 2nd defendant referred extensively to Low Kee Yang on **The Law of Guarantee in Singapore and Malaysia"** and to p. 65, where the said author, in relation to past consideration and the Contracts Act 1950, says:

> ... the question of whether past consideration is valid consideration for a guarantee is again a question of the inter-relation of s. 2(d) and s. 80.

Indian case law is as divided on the issue of whether past consideration is good consideration for a guarantee as Malaysian case law is silent. One view is that the word 'done' (in s. 80) shows that past benefit to the principal debtor can be good consideration for a guarantee. The contrary view is that the act done or the promise made must be contemporaneous with the guarantee. Both the cases supporting the proposition that past consideration is good consideration were in fact referred to by Sharma J in *Guthrie Waugh v. Muthucumaru* but whether he approved of them is not at all clear from the context.

It is submitted that, as with the question of direction of consideration, the real issue is whether s. 80 should be read in conjunction with and ancillary to s. 2(d), and that the answer should be in the affirmative. Past consideration is permissible under s. 80 only in so far as it is permissible under s. 2(d), that is, if it was done at the desire of the surety; otherwise it is not good consideration.

The two sections of the Contracts Act 1950, ss. 2(d) and 80, referred to in the just quoted passage are for ease of reference reproduced here:

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

(a) ...
(b) ...
(c) ...
(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
(e) ...
(f) ...
(g) ...
(h) ...
(i) ...
(j) ...

80. Anything arising, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so provided C will guarantee the payment of the price of the goods, C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is sufficient consideration for C's promise.
(c) A sells and delivers goods to B. C afterwards, without consideration agrees to pay for them in default of B. The agreement is void.

It is apparent from what have been cited by Counsel for the second defendant that it cannot be successfully maintained that past consideration cannot be good consideration. This will be dealt with in more details after adverting to other authorities.

Counsel for the plaintiffs referred to the cases of (1) *Perwira Habib Bank (M) Bhd v. Saiyo Sdn. Bhd. & 2 Ors.* [1991] 3 CLJ 1849; (2) *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn. Bhd. & Ors.* [1988] 3 MLJ 210; (3) *The Chartered Bank v. Cheviot Industries (M) Sdn. Bhd. & Anor.* [1988] 2 CLJ 859 and (4) *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267 and argued that those cases are decisive for the plaintiffs but Counsel for the plaintiffs never advert to the fact that, in the present case, no money was advanced after the execution of the guarantee. Cases (2), (3) and (4), I am of the opinion, are of no help because they involved the dispensation of the moneys guaranteed both before and after the signing of the guarantees. Of relevance is the case (1), that is *Perwira Habib Bank (M) Bhd v. Saiyo Sdn. Bhd. & 2 Ors.* where a loan of RM2 million was disbursed in full in December 1982 and the guarantee for the loan was only executed on 7 September 1983. Dr. Zakaria M. Yatim J. in that case held, relying on *Heng Cheng Swee v. Bangkok Bank Ltd.* case, that there was good consideration even though the loan was disbursed before the execution of the guarantee because the guarantee is a continuing guarantee, and as for the illustration (c) of s. 80 of the Contracts Act 1950, he held that it "does not apply ... because the situation here is different from that envisaged in illustration (c)."

There are two other cases of relevance. One is *Guthrie Waugh Bhd v. Malaippan Muthucumaru* [1972] 1 MLJ 37, a decision of Sharma J., where he at p. 39 says:

> ... to constitute good consideration ... there must be an act, abstinence or promise on the part of the promisee or some other person at the desire of the promisee. The claim can only be good if the promisee acts, abstains or promises to do something in pursuance of the promise ...The Contracts (Malay States) Ordinance 1950 clearly recognises past consideration (see s. 26(b) and s. 2(d)). The words in clause 2(d) of s. 2 "has done or abstained from doing" sufficiently indicate this.

The other case is *Pacific & Orient Insurance Co. Sdn. Bhd. v. Gimstern Corporation (M) Sdn. Bhd. & 5 Ors.* [1989] 2 CLJ 721 where Dato' Mahadev Shankar J, after considering the cases of *Kalicharan v. Abdul Rahman & Ors.* AIR [1918] PC 226 and *M. Gulam Hussein Khan v. M. Fayas Ali Khan* AIR [1949] OUDH 346, held that a past benefit to the principal debtor can be a good consideration and, after considering the illustration (c) of s. 80 of the Contracts Act 1950, he also held that in a one-off transaction, the benefit must be given either at the time of the execution of the guarantee or in future but not a past benefit.

The decision of *Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors.* case and that of the earlier *Pacific & Orient Insurance Co. Sdn. Bhd. v. Gimstern Corporation (M) Sdn. Bhd. & 5 Ors.* case, as regards whether past consideration is good consideration for a guarantee in a one-off transaction, appears to conflict with each other. *Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors.* case appears to me to decide, simpliciter, or it at least follows, that anyone who put his signature to any guarantee in respect of a loan already disbursed, and where the wordings in the guarantee are wide enough to cover loans already disbursed, will be liable, irrespective of whether the loan was given at the guarantors's "desire", irrespective of whether there was at the request of the guarantor forbearance by the creditor to sue and irrespective of whether any further advances were made after the execution of the guarantee. The said decision appears to dispense with the requirement that the "something done" (the loan) must be "at the desire" of the guarantor as laid down in s. 2(d) of the Contracts Act 1950. Such a result, as that of the *Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors.* case, cannot be what the law had intended. I therefore, respectfully, decline to follow the *Perwira Habib Bank (M) Bhd. v. Saiyo Sdn. Bhd. & 2 Ors.* case. I am of the view that in the case of a guarantee in respect of a loan that had already been disbursed at the time of the execution of the guarantee and where no further money was advanced or intended to be advanced after the execution of the guarantee, such guarantee can only be enforceable against the guarantor if the loan was given at the "desire" of the guarantor; this is a requirement of s. 2(d) of the Contracts Act 1950. I also respectfully differ from the *Pacific & Orient Insurance Co. Sdn. Bhd. v. Gimstern Corporation (M) Sdn. Bhd. & 5 Ors.* case in so far as that case decides that past consideration, in a one-off transaction, is not good consideration unless given at the time of the execution of the guarantee because I am of the opinion that past consideration can still be good consideration even if the benefit was not given at the time of the execution of the guarantee in a one-off transaction provided the benefit that was given before the execution of the guarantee was given "at the desire" of the guarantor, for example, where the loan was applied for by or released at the request of the guarantor for which, subsequently, a guarantee was signed; such a guarantee though for past consideration and the benefit though not given at the time of the execution is still good consideration for the guarantee. With that decision, I will now, again, advert to the evidence in this case and to the submissions of Counsel. Given what I have said, I cannot accept the contention of Counsel for the 2nd defendant that because the guarantee was for a past consideration, the guarantee is not enforceable. The authorities and ss. 2(d) and 80 of the Contracts Act, 1950, I have referred to clearly lay down that past consideration can be a good consideration for a guarantee provided that, in a one-off transaction like the present case, the benefit, in this case the loan, given to the principal debtor must have been "at the desire" of the guarantor. Since the Court was not addressed by Counsel for the 2nd defendant on the question of whether the loan in this case given to the 1st defendant was "at the desire" of the

2nd defendant, the Court will assume that it is not an issue. Even if that had been an issue, I would have no difficulty in coming to the conclusion that, since the second defendant and his wife are the only directors of the first defendant and thereby stood to benefit from the loan, *albeit* indirectly, and since the 2nd defendant from the letters produced in Court appeared to be in total charge of the 1st defendant, the loan, it could be inferred, must have been "at the desire" of the 2nd defendant. That being the case, the defence of past consideration or no consideration fails.

It was also argued that the plaintiffs are not allowed to say that there was consideration in the form of forbearance to sue because of s. 92 of the Evidence Act 1950. The answer to that submission is in the case of *Frith v. Frith* [1906] AC 254, at p. 259, where it is said:

> The rule is that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.

That case was cited with approval in *Guthrie Waugh Bhd. v. Malaippan Muthucumaru* case. A further answer is found in *Heng Cheng Swee v. Bangkok Bank Ltd.* case where, at p. 268, it says:

> In the words of Lord Lyndhurst LC in *Clifford v. Turrell* [1845] 14 L.J Ch. 390 at 397: ... the settled rule of law is that you may prove a further consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it.'

The plaintiffs are therefore allowed to prove the existence of a further consideration. But my finding is that the plaintiffs have failed to do so. The plaintiffs have failed to adduce any evidence that there was any request by the 2nd defendant to the plaintiffs to forbear suing the 1st defendant. But first to the law. The wordings "abstinence" and "forbearance", respectively, in s. 2(d) and in illustration (b) of s. 80 of the Contracts Act 1950, provide for forbearance to be a consideration for a guarantee. For a claim based on forbearance to succeed, it must be proved, by direct evidence or by inference from the circumstances of the case, that the guarantor had requested forbearance and that forbearance was granted. See *Osman Bin Abdul Ghani & Anor. v. United Asian Bank Bhd.* [1987] 1 CLJ 139. There was no evidence that the 2nd defendant had written to the plaintiffs to ask for action not to be taken against the 1st defendant. What the plaintiffs had done was to produce the letter Exhibit P6, the contents of which I have earlier set out in full. This Exhibit P6 is not evidence of the 2nd defendant having requested forbearance. At most it was an offer by the plaintiffs to forbear subject to their being "given realistic proposals for the reduction or liquidation of outstandings and the guarantee of the directors". As for the evidence of PW1, the advocate who acted for the bank, he merely testified that he had explained to the 2nd defendant the guarantee was for forbearance on the part of the bank to take legal action against the 1st defendant for money owed to the bank. That evidence cannot be proof, as alleged in the plaintiffs' Reply, that on "23 August 1986, the 2nd defendant called at the plaintiffs' Bank and requested forbearance from the Bank for legal action to be taken against the 1st defendants". There is a total failure to prove that the 2nd defendant on 23 August 1986 or at anytime requested forbearance. Counsel for the plaintiffs must have conceded this point because she did not reply at all, concerning this point, to the submission of Counsel for the 2nd defendant. If the plaintiffs' claim had to rely solely on forbearance, the plaintiffs would have failed in its claim. I will now proceed to deal with the next issue.

B. Undue Influence.

The undue influence which the 2nd defendant had pleaded was that the plaintiffs' solicitors "insisted that unless the 2nd defendant, as a director for the 1st defendants signed a Letter of Guarantee to guarantee the repayment of the banking facilities they would foreclose the securities to secure the banking facilities". The 2nd defendant further pleaded that: "Faced with the threat, the 2nd defendant had no choice but to execute the Letter of Guarantee to guarantee the repayment of the sum of RM288,000 eventhough at that time the outstanding amount allegedly owed by the 1st defendants was less". I would for almost the same reasons as that given by Dato Hj. Mohamad Noor Hj. Ahmad, J. dismissed the

defence of undue influence. It is convenient here to recap the evidence of the 2nd defendant regarding the meeting in the coffee house where it was alleged that PW1 had exerted undue influence on him. It will be recalled that the 2nd defendant was able to get PW1 to meet him in the coffee house instead of PW1's office. Since his evidence is quite short in this regard, I reproduce them here:

> ... PW1 called me over the phone. He asked me to go to his office. He did not mention about the guarantee. I told him that I was going to the coffee house which was in the same block of building and I told him that if he wished he could join me and have coffee. He then said he will come. I went immediately. When I arrived PW1 was already in the coffee house. We ordered coffee and drank. He then took out two blank guarantee forms and asked me to sign. He asked if I sign he could assist me to talk to the bank not to take legal action against my company and that of the securities. At first I did not agree but he insisted saying it was for my own good. I told him I cannot sign because I had to consult my wife, the other director of the company. He told me that there is no need to consult my wife and that if I sign it he would not ask my wife to sign the guarantee. I asked him what the guarantee were for and he said the guarantee were only for the purpose of the bank record. I still maintain I will not sign because the guarantees involve my company accounts and I did not bring the seal of the company. I thought the seals and company chop of the company were required for the guarantees. He told me that there was no need for that. He told me that they were for my benefit and own good and that the bank would not take any legal action against my company and the properties. I asked PW1 to give me time to consider the signing of the guarantees. He said there was no need to consider, so I had no alternative and I trusted him as a friend and I signed the guarantees ...

The 2nd defendant struck me as quite an articulate person. He was unhurried in his response to questions and he was calm and collected in giving his evidence; mostly after going through his file of documents. He is not a person could be pushed into doing something against his will. That the 2nd defendant is such a person is demonstrated by a letter (Exhibit D4) the 2nd defendant wrote, in response to a request in a letter by the manager of the plaintiffs (Exhibit D3) for him to call on the manager. He said in this letter (Exhibit D4):

> Having tried my utmost and failed to solve the problem, I am now giving up trying. An aversion to the whole thing seems to have developed. If you have a solution that can be wrapped up in a few words, please convey it to me so. (Signed) Dr. Andrew Leong Hon Kim, ADK).

He was virtually asking the manager to see him and not the other way round. Such was the forcefulness of the character of the 2nd defendant. This character, that is its forcefulness, was further demonstrated when he got PW1, an advocate, to go to the coffee house instead of him going to PW1's office. He had two months to ponder whether to sign the guarantee. Though I accept most of his evidence as being the truth but there are certain aspects of his evidence which are inherently improbable. The 2nd defendant gave evidence that the guarantee was not mentioned at all when PW1 allegedly phoned him which resulted in his asking PW1 to join him at the coffee house. If PW1 did not mention the guarantee, why was there that need to see PW1 at the coffee house. The truth of the matter is the meeting at the coffee house was for the sole purpose of the execution of the guarantee. The second defendant knew very well that he had to sign the guarantee (and another one which we are not concerned with). By his own admission he had been told of the need to sign the guarantee by the bank staff several times. What happened in the coffee house came as no surprise to the 2nd defendant. He knew he was going there in connection with the execution of the guarantee. In fact he admitted he knew about it after he had received the letter Exhibit P6. Given those facts, it could not be true that the 2nd defendant was totally unprepared for the coffee house meeting and it is equally untrue that he was there faced with the guarantee for the first time and without sufficient time to consider the same. I do not see how PW1 could have influenced the 2nd defendant when PW1 had to go to the coffee house as the 2nd defendant wished. I believe PW1 when he said he did not tell the 2nd defendant that

(1) the guarantee Exhibit P4 was for the record of the bank; and
(2) he would tell the bank not to take action against the 2nd defendant.

It should be noted that there is no evidence as to how long the 2nd defendant was at the coffee house before he signed the guarantee. I will now set out the law on undue influence which has been succinctly stated by Edgar Joseph Jr. J (as he then was) in the case of *Saw Gaik Beow v. Cheong Yew Weng & Ors.* [1989] 3 MLJ 301, and at p. 308, he says:

> ... quite apart from the question of manifest disadvantage, a party relying on the plea of undue influence would have to show that
>
> (a) the other party had the capacity to influence him,
> (b) the influence was exercised,
> (c) its exercise was undue and
> (d) that its exercise brought about the transaction (see *Bank of Credit & Commerce & Anor. v. Aboody).*

As for the burden of proof in cases where a person is deemed, under s. 16(2) of the Contracts Act 1950, to be in a position to dominate the will of another, s. 16(3) of the Contracts Act 1950 provides for the dominating person to prove that the contract was not induced by undue influence. In all other cases, the burden rests with the person who alleges undue influence, which in this case is with the 2nd defendant, as the deeming provision of s. 16(2) of the Contracts Act 1950, does not apply here. Given my finding as to the character of the 2nd defendant which I have hitherto set out and as regards the events in the coffee house, it is my conclusion that PW1 was not in a position to dominate the will of the 2nd defendant. The converse is the truth. A certain span of time is required to work an influence on a person. In this case there is no evidence as to that. The 2nd defendant appears to be a man of letter, judging by the "Dr." he used but in any event he appears to me to be a man wise of the world. That he is able to conduct the trial of this case on his own lends support to my description of him. If he had wanted a lawyer before he signed the guarantee, he would have asked for one. He did not say he wanted one or that he needed to be advised. There is therefore no merit in the contention of Counsel for the 2nd defendant that the 2nd defendant ought to have independent legal advice. The lack of such does not mean that there was undue influence exerted by PW1 on the second defendant. In any event the 2nd defendant knew months in advance the need to sign the guarantee. Therefore the 2nd defendant has failed to prove undue influence. There are other allegations of the 2nd defendant tending to show that there was misrepresentation on the part of PW1. Since the 2nd defendant's defence is not based on misrepresentation, I will not deal with them as they are in issue and are therefore irrelevant. As for the threat of foreclosure, it was held in the case of *Maria Chia Sook Lan v. Bank of China* [1976] 1 MLJ 245 that such could not amount to undue influence. To the next issue I will now go.

C. Failure to Appoint Receiver.

The failure to appoint a receiver related to the period in 1983 where the 2nd defendant went to see the manager of the plaintiffs to appoint a receiver under a debenture and dispose of the stock of veneer and this was not done with the result that the stock of veneer has rotted. The Court was referred to s. 92 of the Contracts Act 1950, and to the said text of the author Low Kee Yang, at p. 162. But the said author at p. 162 said this:

> A surety is also not discharged if by a clause in the guarantee, he had agreed to the creditor dealing with the security in the manner complained of.

Counsel for the plaintiffs referred to clauses 6, 7, 11 and 12 of the guarantee, which I have earlier reproduced, and said that the 2nd defendant cannot complain about the very thing which he had agreed by the said clauses 6, 7, 11 and 12. I agree with her submission. A somewhat similar situation pertains in the case of *Bank Bumiputra Malaysia Bhd. v. Kredin Sdn. Bhd. & Anor.* [1989] 1 MLJ 323 and it was held in that case by VC George, J that such a defence had no merit. I am also of the same view. With that I have come to the last of the issues.

D. Whether the 2nd defendant had agreed to the terms of the guarantee Exhibit P4.

Counsel for the second defendant submitted that the plaintiffs must prove the second defendant had agreed to all the terms stated in the guarantee Exhibit P4 because the second defendant had executed the guarantee Exhibit P4 in blank, that is, the "RM288,000" limit of liability and the interest rate were not stated at the time the second defendant executed the guarantee Exhibit P4. I will again

first advert to the relevant evidence. Two blank guarantees were allegedly forwarded to the 2nd defendant *vide* the letter Exhibit P6; "blank" in the sense I have earlier used. PW1 testified that the figures in the guarantee were inserted by his law firm after the same were supplied by the bank and before the 2nd defendant had signed the same. He cannot remember how the guarantee came to be in his firm's possession. He produced no letter from the plaintiffs to back up his allegation that he was supplied the figures by the plaintiffs and PW2, an officer of the plaintiffs, did not corroborate his evidence. At the very least, if the particulars for the guarantee were supplied orally by someone working for the plaintiffs to someone in the law firm of PW1, the information must have been reduced into writing by that someone in the legal firm. Such evidence, which surely must exist if the particulars were supplied orally, was not produced in Court. If the particulars were supplied in the form of a letter, then PW1 and PW2 have failed to produce the same. The result of such failure is that I am inclined to believe the 2nd defendant that when he signed the guarantee it was blank in the said sense I have said earlier. This is even more so when one takes into account the fact that the limit of liability to be inserted in the guarantee depended on when the 2nd defendant signed the guarantee; the later he signed, the higher would be the limit of the liability and hence the guarantee was most probably signed in blank. What then is the result of the guarantee being signed in blank? The guarantee, in the absence of fraud and misrepresentation, is still valid. *Malaysian French Bank Bhd. v. Abdullah bin Mohd. Yusof & Ors.* [1991] 2 MLJ 474; *Gopal a/l Krishnan v. Syed Azman bin Syed Mohd. & Anor.* [1991] 3 CLJ 1778 and *UMW Industries (1985) Sdn. Bhd. v. Kamruddin bin Abdullah & Anor.* [1989] 2 CLJ 1278. Therefore, contrary to what has been submitted by Counsel for the 2nd defendant, there is no doubt as to the quantum under the guarantee and it is spelt out in clause 1 of the guarantee and which is - all sums of money due on any account of the 1st defendant; this includes the moneys due under the term loan account no. 396-017055-034 and under the overdraft account no. 396-017055-001. This defence also fails.

E. Conclusion.

In the premises I order judgment to be entered for the plaintiffs against the 2nd defendant for the sum of RM310,875.26 together with interest thereon at the rate of 9.75% per annum from 14 July 1987 until full payment. I also order costs to be taxed and to be paid by the 2nd defendant to the plaintiffs.

Reported by Shamsiah Begum Subhan.